No. 82-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
Petitioners,

vs.

HERMAN DELGADO, ET AL.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC. AND THE AMERICAN JEWISH COMMITTEE AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

MICHAEL KANTOR
Amicus Curiae Counsel of Record,

ALAN DIAMOND
JOHN W. COCHRANE
CABY H. THOMPSON
MANATT, PHELPS, ROTHENBERG & TUNNEY,
1888 Century Park East
21st Floor
Los Angeles, California 90067
(213) 556-1500
Attorneys for Amicus Curiae, Mexican American Legal Defense and Education Fund, Inc. and American Jewish Committee

Bowne of L.A., Inc., Financial Printers, Los Angeles. Phone (213) 742-6600

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21st Floor
Los Angeles, California 90067
(213) 556-1500
Attorneys for Amicus Curiae, Mexican American Legal Defense and Education Fund, Inc. and American Jewish Committee

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INTEREST OF AMICUS

This amicus brief is filed on behalf of the American Jewish Committee ("AJC") and the Mexican American Legal Defense and Education Fund, Inc. ("MALDEF"), two organizations deeply concerned with the protection of civil rights and the guaranteeing of equality for all.

MALDEF and the AJC believe that the Immigration and Naturalization Service's factory raids and their use of racial characteristics as a primary factor in determining those persons to be detained and questioned violate the Constitutional rights of persons of Latin ancestry and pose a potential threat to members of all minority groups.

ISSUE PRESENTED

Do the factory raids conducted by the Immigration and Naturalization Service violate the Fourth and Fifth Amendments of the Constitution and Section 287 of the Immigration and Nationality Act, 8 U.S.C. § 1357?

STATEMENT OF THE CASE

This lawsuit involves a search and seizure practice engaged in by the Immigration and Naturalization Service ("INS") — the self-styled "factory survey" — which by its nature depends on, and in application results in, the use by the Federal Government of an invidious racial and ethnic classification. Interestingly, the Justice Department itself has abandoned the term factory survey in favor of the term factory raid,[1] a name which better approximates the real nature of this practice: the mass detention and interrogation of numerous individuals of Hispanic ancestry at places of employment hundreds of miles from the Mexican border on no more than the chance that persons of brown skin who speak with an accent might conceivably be deportable aliens.

The individual plaintiffs in this case are natural-born citizens of the United States (Herman Delgado and Ramona Correa) and lawful resident aliens (Frances Labonte and Maria Miramontes), each for more than 20 years. (J. A. at 79, 100; Deposition of Frances Labonte at 6; Deposition of Maria Miramontes at 18). Plaintiffs Delgado, Correa and Labonte at the time of the factory raids were employed at the Southern California Davis Pleating Company ("Davis") and plaintiff Miramontes was employed at Mr. Pleat. (Delgado Deposition at 8; Correa Deposition at 5; Labonte Deposition at 5; Miramontes Deposition at 5).

On the mornings of January 4, 1977, and again on September 27, 1977, agents of the INS raided the Davis garment factory searching for undocumented aliens. The Mr. Pleat factory was raided by the INS on October 3, 1977.

While the determination to raid a particular factory is often based on a complaint (J.A. at 47), the record below is bereft of any evidence which would suggest that the complaints relied on by the INS in this case were reliable, or were themselves using other than racial factors in reaching the conclusion that aliens illegally in the United States were working at a particular factory. The record

[1] Los Angeles Times, January 17, 1981, Part 1, at 21.

below, comprising numerous depositions of INS agents and management personnel, responses to interrogatories and sworn affidavits, demonstrates that no INS agent had consulted specific objective criteria in determining whether any of the roving patrol raids on the factories involved herein were in order. On the contrary, the factors looked to were largely limited to the racial or ethnic characteristics of the work force: for example, the Hispanic appearance of the employees and whether or not Spanish was spoken. (*See, e.g.*, Tellez Deposition at 8-9). Mr. Kee, for example, relied on the fact that he had observed 20 persons of "apparent Latin descent" inside the Davis factory as a basis for showing probable cause that illegal aliens were employed there.[2]

The INS conceded that all factory raids in which its agents are involved are carried out in the same manner as the three raids which are the subject of this lawsuit. (J.A. at 48). On the date of a raid, a large number of INS agents appear suddenly at a factory carrying guns and wearing badges. (Deposition of Gilbert Clarin at 109; Smith Deposition at 111). All exits are sealed so that "individuals will not escape." (J.A. at 48). The workers are aware that the exits are sealed and guarded. (J.A. at 143-44). Some individuals attempt to flee or hide. (J.A. at 53). Most workers, however, remain at their work stations doing nothing unusual. (Clarin Deposition at 101-102). Those who attempt to escape are quickly apprehended by INS agents, arrested and handcuffed in plain view of the remainder of the employees. (Walters Deposition at 44; Clarin Deposition at 108, 109; J.A. at 103). After the initial confusion and a

[2] Probable cause for a search warrant was also based on statements obtained from three Latin American women arrested on their way to work at the Davis plant. The statements implied that other employees of the Davis plant were undocumented workers. None of the three women, however, gave the INS a single name, nor did they identify any person alleged to be an illegal alien. There was nothing to indicate that the three aliens arrested were not themselves using racial characteristics as the sole basis for concluding that aliens illegally in the United States were working at the partciular factory.

flurry of arrests of those attempting to flee, the agents disperse throughout the factory, walking up and down the aisles indiscriminately singling out individuals to be questioned. (J.A. at 84-88; Clarin Deposition at 104; Kee Deposition at 66). The questioning includes inquiries as to the individual's birth place, education, current and previous places at residence and citizenship. (Kee Deposition at 66, 68-69; Dodds Deposition at 78-81). Mr. Labonte and Ms. Miramontes were told to produce their papers proving legal residency. (Clarin Deposition at 111-112; Dodds Deposition at 78-80; Delgado Deposition at 78-81).

For one or two hours the questioning of individual workers by the INS agents continues. (J.A. at 48). Understandably, the workers are nervous and extremely frightened during this time. (J.A. at 103, 107, 121, 129). There is a clear perception by the members of the work force that individuals with Latin features are singled out for attention by INS agents. (J.A. at 85-87). Work at the factory comes to a virtual standstill while the INS agents remain in the factory. (J.A. at 86, 89, 122). After the INS agents leave, the factor employees remain upset and nervous for days. (J.A. at 16, 130).

To the extent that INS agents apply standards in determining whom to question, they are clearly racial in nature. Phillip Smith, Assistant Director of Investigations for the INS, candidly admitted that Latin appearance was a major factor considered by INS agents. (Smith Deposition at 166-169). Mr. Smith characterized the Latin appearance as consisting of "dark hair," "brown eyes," and "darker skin than other people." (Smith Deposition at 168-169). When asked whether he could point to other factors that would distinguish illegal aliens from legal residents or U.S. citizens, Mr. Smith was unable to do so, testifying that he took into account only whether an individual spoke Spanish or was dressed in "Mexican garb" or was nervous, factors which could obviously apply to legal aliens or U.S. citizens

as well. (Smith Deposition at 151). Other INS agents openly admitted that they based their individual interrogation decisions on whether or not a person had Latin features, the clothing that an individual was wearing and whether an individual could speak English. (Clarin Deposition at 78a, 106; Tellez Deposition at 8; Walters Deposition at 37, 43).

Absent the factors mentioned above, the depositions of INS agents involved in the raids in question are bereft of criteria, specific and articulable or otherwise, that would provide an objective standard on which to base a determination as to which individuals should be detained and questioned from among the detained employees. Indeed, Assistant Director Phillip Smith conceded that field agents were given no guidance on how to determine who should be questioned during a factory raid. (Smith Deposition at 151). Further, the INS itself admitted in its Answers to Interrogatories that, in a factory raid, agents often have no specific, articulable reason for questioning specific individuals. (Answer to Plaintiff's Fourth Set of Interrogatories, No. 6) — much less for detaining each and every member of the work force.

On the basis of the foregoing testimony alone, the Court can see the pervasive manner in which impermissible racial characteristics are used in INS factory raids. In addition, the record contains expert testimony that establishes that the very characteristics on which the INS relies are totally insufficient to provide a basis for distinguishing undocumented aliens from legal residents or U.S. citizens.[3]

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[3] For example, Professor Wayne A. Cornelius of the University of California, San Diego, and Professor Sheldon Maram of California State University, Fullerton, both experts in the area of Latin American immigration, testified that they were unaware of any difference between legal immigrants or naturalized citizens of Latin ancestry, on the one hand, and undocumented aliens, on the other, with respect to skin color, eye color, hair color, height or other physical characteristics. (J.A. at 58, 65-67). The utility of relying on manner of dress or type of clothing in attempting to uncover aliens illegally in the United States is also questionable. (J.A. at 58-59, 67-69)

I.

FACTORY RAIDS VIOLATE THE IMMIGRATION AND NATIONALITY ACT, §§ 287(a)(1) and (2).

Petitioners contend that Section 287(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(1) (1976) authorized the factory raids conducted in this case. That section provides that INS agents may, without a warrant, "interrogate any alien or person believed to be an alien as to his right to be and remain in the United States." Assuming *arguendo* that § (a)(1) is applicable to the actions of the INS in detaining an entire work force for selective questioning, that section does not authorize the blanket, racially-motivated detentions involved herein.

When Congress enacted § 287 in 1952, it made "a carefully considered distinction between powers which may be exercised without warrant and where such a warrant will be required." H.Rep. No. 1365, 82d Code Cong., 2d Sess. 55, *reprinted in* [1952] U.S. Code Cong. and Ad. News 1653, 1710. Thus, § 287(a)(1) authorizes questioning of suspected "aliens," while § 287(a)(2) authorizes custodial detention or arrest of suspected "illegal aliens" even in the absence of an arrest warrant.[4]

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[4] Respondents do not concede that "detentive" interrogations are contemplated or authorized by § 287(a)(1). Rather, it is *only* § 287(a)(2) which authorizes the "arrest" of an *individual* which the INS may have an articulable basis to believe is an *illegal* alien. This distinction between §§ (a)(1) and (a)(2) is both crucial and consistently overlooked by the courts. For example, in *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 880-884, (1975), this Court construed § (a)(1) to authorize "*Terry*-stops" under certain circumstances, without mention of § (a)(2). *See also, e.g., Lee v. INS*, 590 F.2d 497, 500-01 (3d Cir. 1979).

The difficulty with this construction of § (a)(1) – or failure to address § (a)(2) – lies in the failure to acknowledge the legislative background of the statute. At the time of the enactment of § 287 in 1952, the term "arrest" was legally understood to encompass "an actual or constructive seizure of the person, performed [and understood] with the intention to effect an arrest," *Jenkins v. United States*, 161 F.2d 99, 101 (10th Cir. 1947) (emphasis added); *accord, e.g., United States v. Scott*, 149 F. Supp. 837, 840 (D.D.C. 1957); *See* Black's Law Dictionary 140 (4th Ed. 1951). Such a definition encompasses the subsequently developed "detentive questioning" articulated by this Court in *Terry v. Ohio*. Thus, as the statute

(Footnote continued on next page)

Section 287(a)(1) itself does not support the INS. By its terms, § (a)(1) permits the questioning of "any person believed to be an alien." This language necessarily requires *belief* that the *individual* being questioned is an alien. The requirement of individualized belief is necessary to assure consistency with the requirements of the Fourth Amendment, as discussed below, and serves to protect citizens from the threat of unwarranted invasions of their privacy by government authority. Individualized belief of alienage provides at least some of the protection from arbitrary government activity that would ordinarily be provided by a warrant.

As this Court emphasized in *Brown vs. Texas*, 443 U.S. 47, 52 (1979), "When . . . a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."[5] Unless § 287(a)(1) requires objective and individualized criteria, its requirements of belief would be largely eviscerated since an officer's testimony that he subjectively believed the questioned person to be an alien would be almost impossible to evaluate. Because courts

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(Footnote continued)
should of course be viewed in light of its history and as Congress is deemed to legislate with an understanding of existing law, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, (1983); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), it is submitted that *detentive* questioning by the INS can only be authorized statutorily by § 287(a)(2). That provision on its face requires specific and individualized suspicion of illegal alienage in order to justify the significant intrusion upon personal rights entailed by such involuntary detention and interrogation by the INS. It is further submitted that such a construction of §§ (a)(1) and (a)(2) would eliminate the rampant abuse of personal liberties evidenced by the INS's mass detentions at issue in this case. The statute should be construed as written by Congress, *e.g.*, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). The present construction of § (a)(1) and avoidance of § (a)(2) only serves to invite the uncomfortable constitutional confrontations which are presented by this matter. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[5] A requirement of objective criteria is consistent with the interpretations of § 287(a)(1) by the few lower courts which have considered the requirements of that section independent of the Fourth Amendment. In *Tejeda-Mata v. INS*, 626 F.2d 721, 724 (9th Cir. 1980), *cert. denied*, 456 U.S. 994 (1982), for example, the court required (and found) adequate circumstances to support the "reasonableness" of the INS agent's belief of alienage.

must give effect to every provision of a statute if possible, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), the statute should be interpreted as requiring objective criteria.

In the case of factory raids the INS can show *neither* objective *nor* subjective belief. In its sworn answers to interrogatories the INS admitted that, in a factory raid, agents often have no specific, articulable reason for questioning and detaining individuals. Answer to Plaintiff's Fourth Set of Interrogatories, No. 6. If the justifications are viewed objectively, it is clear the agents had insufficient grounds to believe those questioned were aliens. At most, all they knew is that informers had told them the factories employed illegal aliens and that some of the employees appeared to be of Hispanic ancestry. Perhaps they noticed that some spoke with an "accent," although one may ask how they would know this in most cases until after they had commenced interrogation. This is simply not enough to justify a belief of alienage. In Southern California, and indeed in most of the Southwest, large proportions of the citizenry are or appear to be of Hispanic ancestry, and many citizens speak Spanish as their preferred tongue. *See, e.g., U.S. v. Brignoni-Ponce, supra* 442 U.S. at 887 & n.12 (1975).

If the INS is permitted to detain and question people — including American citizens — merely because of their appearance, Americans like respondents Delgado and Correa will inevitably be interrogated in total disregard of their rights as citizens. The court of appeals was therefore correct in reversing the district court's summary judgment for the INS. Even if § 287(a)(i) is held to apply herein, *but see* note 4, *supra*, the INS's factory raid procedures are inherently contrary to that provision's demand for reasonable, individualized belief of alienage.

II.

FACTORY RAIDS VIOLATE THE FOURTH AMENDMENT

A. The INS Actions Constituted A Seizure Invoking The Protections Of The Fourth Amendment.

The government argues that INS agents' conduct did not constitute a seizure and thus need not be measured against the fundamental standard of the Fourth Amendment that government conduct be reasonable. This contention borders on the frivolous, and serves only to distract the Court from the real issues of this case. *Every* lower court which has considered factory raids or on-the-job questioning — even the one which approved the conduct as "reasonable" — has found a seizure and has gone on to apply the strictures of the Constitution. *ILGWU v. Sureck*, 681 F.2d 624, 634 (9th Cir. 1982), *cert. granted, INS v. Delgado*, 103 S.Ct. 1872 (1983); *Babula v. INS*, 665 F.2d 293, 295 (3d Cir. 1981), *cert. granted, INS v. Delgado*, 103 S.Ct. 1872 (1983); *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971); *Illinois Migrant Council v. Pilliod*, 531 F.Supp. 1011, 1018 (N.D. Ill. 1982).

The basic test for whether a seizure has occurred was laid down by this Court in *Terry v. Ohio*, 392 U.S. 1, 16 (1968):

> "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."

In *U.S. v. Mendenhall*, 446 U.S. 544, (1980), Justice Stewart proposed an amplification of this test: "whether a reasonable person would have believed that he was not free to leave." *Id.* at 544 (Opinion of Stewart, J.). In *Florida v. Royer*, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), five members of this Court accepted this test. *Id.* at 1327 (Opinion of White, J.); *id.* at 1332 (Opinion of Blackmun, J.).

Applying the *Mendenhall* test, the Court of Appeals concluded that the entire work force was seized when the INS sealed the exits of the factories and began questioning. The facts strongly support this finding: the factory workers neither could have reasonably believed they were, nor were

they in fact, free to leave or to ignore the questions of the INS. There is no question that INS agents sealed the exits to prevent individuals from "escaping,"[6] or that the workers were unaware of this.

The government also claims that no seizure occurred because the workers were not truly "free to leave" in any event, since they were supposed to be at their work positions anyway. This argument seriously distorts the purpose of the "free to leave" criterion. The point is to distinguish between voluntary and coerced reaction to police conduct. That the workers needed to stay at their work posts *increases*, rather than reduces, the extent of the coercive force applied by the INS. By entering and interrogating during work hours, the INS appeared to be acting under color not only of the government's authority but the employer's as well. The INS chose the time and place of the interrogation: it thereby evidently meant to use not only the workers' natural fear of government agents, but also, the fear of losing wages or employment to coerce cooperation.

The government also argues that employees who were not illegal aliens would not have felt their freedom restrained, since they supposedly had nothing to fear from the agents. (Petitioner's Brief at 23). This is both patently absurd as an empirical proposition and irrelevant to the inquiry. Especially given the criteria being used by the agents (ethnic appearance), an American citizen of Mexican ancestry might well fear that he would be harassed by the agents and his truthful assertion of citizenship disbelieved. Even assuming that the simple statement, "I am a citizen" would be enough to satisfy the agents, this still means that to get past the guards at the doors the citizen is *forced to respond* to any questions asked. A failure or refusal to respond might well result in detention or further

[6] As the court observed in *Illinois Migrant Council v. Pilliod*, *supra*, 531 F.Supp. at 1019, "when agents are stationed at points of egress, it is only reasonable to infer that they are there in order to restrict egress." The *Pilliod* court then rejected as "inherently incredible" claims that the INS' agents would not have detained anyone who attempted to leave. In this case the INS makes no such claim.

harassment.[7] For police action not to constitute a seizure it is essential that the individual be free to "decline to listed to the questions at all and . . . go on his way," and the refusal to respond may not of itself justify detention. *Florida v. Royer, supra,* 103 S.Ct. at 1324 (Opinion of White, J.). If the government argument were accepted, it would justify all seizures under *any* circumstances, since by the government's reasoning no innocent person ever has anything to fear. But the Fourth Amendment protects the innocent individual's right to be left alone.

Even if the entire workforce was not seized for the duration of the raid, each questioned worker was seized during the time he or she was interrogated. The same coercive factors discussed above, combined with the direct assertion of authority in a one-on-one context, make it highly implausible that a person could have reasonably believed he could refuse to reply, or could walk away without triggering possible retribution. *See, e.g., Marquez v. Kiley,* 436 F.Supp. 100, 113-114 (S.D.N.Y. 1977), where the judge acknowledged that consensual questioning is always permissible but observed that as between an armed immigration official and a suspected alien "voluntary" questioning is virtually impossible.

B. **The Fourth Amendment Requires A Careful And Critical Balancing Of Government And Individual Interests.**

The question presented by this case is not, as shown in the preceding section, *whether* the Fourth Amendment applies, but *how* it applies. This Court has repeatedly held that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *U.S. v. Villamonte-Marquez,* 103 S.Ct. 2573, 2579 (1983); *quoting Delaware v. Prouse,* 440 U.S. 648, 654 (1979); *U.S. v. Brignoni-Ponce, supra,* 422 U.S. at 878. The individual interests involved

[7] *See, e.g., Mendoza v. INS,* 559 F.Supp. 842 (W.D. Tex. 1982), recounting how one non-English-speaking citizen was arrested and detained for four hours although he produced documents establishing citizenship, because the agents disbelieved their authenticity.

are among the most basic in our society: the right to be left alone, and "to personal security free from arbitrary interference by law officers." *Brown v. Texas, supra,* 443 U.S. at 50, *quoting Pennsylvania v. Mimms,* 424 U.S. 106, 108 (1977). It is therefore appropriate for this Court to scrutinize the asserted governmental interests with considerable care, maintaining a particular sensitivity to the protection of individual autonomy and the danger of governmental use of impermissible criteria for determining who shall be made subject to detentive authority. Thus, "the scope of the detention must be carefully tailored to its underlying justification," *Florida v. Royer, supra,* 103 S.Ct. at 1325 (Opinion of White, J.); *see also Terry v. Ohio, supra,* 392 U.S. at 19; and this Court demands specific information to justify such detention, *U.S. v. Cortez,* 449 U.S. 411, 418 (1981). Moreover, while the existence of less intrusive alternatives to the challenged police conduct does not automatically make that conduct unconstitutional, *Illinois v. Lafayette,* 103 S.Ct. 2605, 2610 (1983), the existence of such alternatives certainly diminishes the government's interest in using the more intrusive procedures. *See, e.g., U.S. v. Place,* 103 S.Ct. 2637, 2645-46; *Delaware v. Prouse, supra,* 440 U.S. at 659.

In assessing the government's interest, it is also appropriate for this Court to assess the effectiveness or ineffectiveness of the conduct in accomplishing the stated goals. *See, e.g., id* at 659-661, *U.S. v. Brignoni-Ponce, supra,* 422 U.S. at 914-15 (White, J., concurring). Finally, it is essential to remember that the rights of *citizens,* such as respondents Delgado and Correa, are implicated: even if Congress may condition the entry of aliens into this country on their agreement to "submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens." *Id.* at 884 (majority opinion).

C. The Fourth Amendment Demands Individualized Suspicion Of Illegal Conduct As A Prerequisite To Seizures Of Individuals.

1. This Court Requires Individualized Suspicion Except In a Few Limited Circumstances Inapplicable Here.

A seizure amounting to less than a full arrest may, under certain limited circumstances, be "reasonable" under the Fourth Amendment though justified by less than probable cause. *Terry v. Ohio, supra.* In such cases, however, the critical balance of individual and government interests demands that a detention be justified, at a minimum, by "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *U.S. v. Cortez, supra,* 449 U.S. at 417-18. *Cortez* held that the determination of whether an adequate basis for suspicion existed must be based on "the totality of circumstances," *id.* at 417, and thus approved the inclusion of a government official's expertise and logical deductions in the determination. But *Cortez* in no way weakened the demand that the suspicion justifying any seizure must be *individualized*: it must be "a suspicion that the *particular* individual being stopped is engaged in wrongdoing.... This demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence.*" *Id.* at 418, *quoting Terry v. Ohio, supra,* 392 US at 21, n.18.

The purpose of the individualization requirement is basic to our system of governance: to prevent *arbitrary* violations of individual privacy by government officials who may choose to invade that privacy for impermissible reasons (*e.g.*, to harass a person because of his appearance of race, *cf. Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972)) or for no reason at all. *See, e.g., Delaware v. Prouse, supra,* 440 U.S. at 650. This concern animates not only the Fourth Amendment but other clauses of the Constitution, such as the Fifth Amendment, as well. *See, e.g.,*

Kolender v. Lawson, 103 S.Ct 1855, 1858 (1983), noting that "the more important aspect of vagueness doctrine 'is . . . the requirement that the legislature establish minimal guidelines to govern law enforcement,' to prevent statutes from authorizing 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predelictions.'" (*quoting Smith v. Goguen*, 415 U.S. 566, 574-575 (1974)).

This Court has authorized exceptions to the demand for individualized suspicion only in extremely limited circumstances, where other factors served to circumscribe the officer's discretion and the intrusion on privacy was extremely minimal, or where the individual's reasonable expectation of privacy was limited by long-standing custom. For example, no individualized suspicion is required to justify a stop and search at the border. *Carroll v. U.S.*, 267 U.S. 132, 153-54 (1925). This was explained in terms of "national self-protection," *id.* at 154, but additionally the expectation of privacy is very low because one crossing the border knows that detention or search is and has always been a possibility in that context. Moreover, border searches are made at fixed points of entry or their functional equivalents, *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 272-73 (1973), and thus present less of an element of surprise to the individual while restricting the discretion of officials. Similarly, in *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976), this Court approved routine, brief questioning without individualized suspicion at permanent checkpoints near the border. The individual's expectation of privacy in such a case is limited, not only because the expectation of privacy in a car is lower in general, *id.* at 156, but also because the traveler is "not taken by surprise as they know, or may obtain knowledge of the checkpoints," *id.* at 559. Moreover, the discretion of the questioning officials is circumscribed: the checkpoint is at a pre-determined, fixed location, *id.* at 559; every car is detained, *id.* at 545-46; the choice of whom to select for longer detention at secondary

inspection areas is made by a different agent from the one who conducts the questioning, *id.* at 546; and the stops are limited to brief questioning, *id.* at 546-47. Just as important, this limitation on discretion is apparent to the motorists. *Id.* at 559. The actual and apparent limits on discretion are extremely important. Thus, in *Brown v. Texas, supra,* 443 U.S. 47 (1979) and *Delaware v. Prouse, supra,* 440 U.S. 641 (1979) this Court disapproved questioning without individualized suspicion while recognizing that non-arbitrary means of selection (roadblocks, for example), may be acceptable in limited circumstances, where the limits on discretion are apparent to the individuals being questioned. *Brown, supra,* 443 U.S. at 51; *Prouse, supra,* 440 U.S. at 657.

In *U.S. v. Villamonte-Marquez, supra,* 103 S.Ct. 2573, this Court approved another closely-limited exception to the requirement of individualized suspicion. The Court held constitutional a statute authorizing customs officials to board any vessel in American waters, but only for purposes of examining its documentation. The Court found that the intrusion on privacy was limited, in part because it involved "only a brief detention," *id.* at 2581, but more importantly because the expectation of privacy a boat owner or passenger could reasonably have — with respect to document checks — is circumscribed by the long-standing laws, beginning with an act of the First Congress, authorizing such boardings, *id.* at 2577-78 & n. 4.

Villamonte-Marquez thus falls into a line of cases holding that in particular circumstances there is "such a history of government oversight that no reasonable expectation of privacy . . . could exist." *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978). Boats are thus treated much like gun stores, *see U.S. v. Biswell,* 406 U.S. 311 (1972) (upholding warrantless inspection of gun storeroom pursuant to the Control Act), liquor dealerships, *see Colonnade Catering Corp. v. U.S.* 397 U.S. 72 (1970) (holding that Congress had power to authorize search, though it had not done so), or

mines, *see Donovan v. Dewey*, 452 U.S. 594 (1981) (upholding warrantless mine safety inspections).

The conceptual basis for the above decisions is essentially that "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Marshall v. Barlow's, Inc., supra*, 436 U.S. at 313. Moreover, all these cases, like *Camara v. Municipal Court*, 387 U.S. 523 (1967), authorize intrusions which are *not* "personal in nature," *id.* at 537. In all these cases the government intrusion — whether questioning or a search — is oriented towards investigation of the *property* — the conformance of the boat, the business premises, or the building to the applicable regulations. By contrast the workers in a factory do not "consent" to being interrogated, and the questions relate to their residency status, which is about as "personal" as questioning can get.

2. **The Lower Courts Have Required Individualized Suspicion.**

In determining the bounds placed on INS factory raids, area control operations, and on-the-job questioning by the Fourth Amendment, the lower courts with only one exception have found that detentive questioning must be supported by individualized suspicion. *ILGWU v. Sureck, supra*, 681 F.2d at 634; *Illinois Migrant Council v. Pilliod, supra*, 548 F.2d at 715; *Ojeda-Vinales v. INS*, 523 F.2d 286, 288 (2d Cir. 1975); *Au Yi Lau v. INS, supra*, 445 F.2d at 223; *Marquez v. Kiley, supra*, 436 F.Supp. at 114.

The exception is *Babula v. INS, supra*, 665 F.2d 293, wherein two members of the panel held that detentive questioning of individuals was permissable based *only* on knowledge that "the milieu in which the workers were found" included illegal aliens, *id.* at 296. The Court of Appeals in the instant case properly rejected *Babula*, noting that it conflicts with the prior case law in the Third Circuit and apparently misread precedents from other circuits. Furthermore, as Judge Adams' concurrence in *Babula* demonstrates, the

majority decision is dictum.[8] The "milieu" theory in *Babula* is wholly at odds with the fundamental American principle that we judge people for what they *are* rather than whom they associate with. *Cf. Sibron v. New York*, 392 U.S. 40, 62 (1968) ("inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics" inadequate to justify detentive questioning); *Ybarra v. Illinois*, 444 U.S. 85 (1979) (presence in public tavern at same time as suspected narcotics dealer insufficient to justify frisk). The "milieu" theory would, for example, justify seizing everyone in a given neighborhood because of suspicion that someone is breaking the law there. It is not stretching matters too far to say that the *Babula* court's reasoning would put an end to the protections of the Fourth Amendment as we know it.[9]

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[8] Unlike this case or *Pilliod* and *Marquez*, *Babula* was an effort by illegal aliens to prevent their own deportation rather than a suit by legal residents and citizens to prevent violation of their constitutional rights. It is clear that an illegal *arrest* will "not invalidate a subsequent prosecution and conviction," nor "bar commencement of a civil deportation proceeding." *Medina-Sandoval v. INS*, 524 F.2d 658, 659 (9th Cir. 1975). As Judge Adams notes, even if the exclusionary rule does apply to deportation proceedings – an issue in no way presented by this case – there was easily enough evidence untainted by the illegal arrests in *Babula* to support the finding that the aliens were in this country illegally. *Babula, supra*, 665 F.2d at 301-302 (Adams, J., concurring). Thus, the *Babula* court had no need to reach the issue of the constitutionality of the factory raid.

[9] The *Babula* court additionally noted that all the employees at the factory were questioned, and thus analogized the raid to a permissible "roadblock." This reasoning has several flaws, especially as applied to the facts of this case, where not all workers were questioned, *see Sureck, supra*, 681 F.2d at 643, probably because this search was directed at a racially identifiable minority (Mexicans) rather than at a subgroup of caucasians (the aliens in *Babula* were all Polish). Even if the INS had, in the instant case, interrogated everyone at Davis or Mr. Pleat, it is obvious that only those with Latin appearance or accent had anything to fear – and those individuals would know it. The appearance of uniform enforcement, which makes roadblocks less threatening, would thus be wholly absent. Moreover, the INS would have no *statutory* authority to interrogate those not believed to be aliens. 8 U.S.C. § 1357(a)(1). While it may be conceivable that the INS truly suspected everyone – at least the white employees – at the factory in *Babula* of being Polish; this theory is plainly untenable in this case, where ethnic

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3. The Individual Interests Protected By The Fourth Amendment Greatly Outweigh The Government's Interest In Engaging In Factory Raids.

A careful consideration of the individual and governmental interests at stake in a factory raid demonstrates that factory raids are unreasonable under the Fourth Amendment and that individualized suspicion is required. Factory raids are highly disruptive, insulting and stigmatizing; they deeply invade a strong interest in freedom from unwarranted invasion of liberty and privacy rights; they are a less than effective means of carrying out a government interest which can be effectuated through alternative means more compatible with expectations of privacy.

Both *Martinez-Fuerte* and *Villamonte-Marquez* (as well as the border cases), which have allowed detention without individualized suspicion, have involved persons in moving vehicles where the expectation of privacy is limited. By contrast, the privacy interest in the workplace is much stronger. In *See v. City of Seattle*, 387 U.S. 541, 543 (1967), this Court stated, "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his commercial property." *See also, Gillard v. Schmidt*, 579 F.2d 825 (3d Cir. 1978). (A schoolteacher's Fourth Amendment rights were violated by an unwarranted search of her work desk.) Here, the worker's interest in being left alone is even greater, because the questioning disrupts their earning ability.

While a worker's zone of privacy at the workplace may in some ways be less strong than in the home, it is actually infringed more seriously by the type of questioning at issue here. When one is questioned in the privacy of one's home, others cannot see that the individual is being subjected to questioning, nor can they hear the individual's responses

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appearance was the only trigger for suspicion. Under any circumstance, such a wholesale dragnet interrogation would be so disruptive and oppressive as to be unjustified by any legitimate government purposes.

(or refusal to respond) to that questioning. But, in the workplace, this is obvious and audible to everyone nearby. An individual may well prefer not to have the entire workforce know answers to such questions as "where were you born" (for example, if he was adopted and moved away from his birthplace) or "are you a citizen." While a legal alien may be required to identify himself as such to the proper government authorities, there is absolutely no reason why this status should be broadcast to his co-workers, some of whom may consider non-citizenship a mark of inferiority.

Thus, the factory raid procedures are highly intrusive of the individual's privacy. They are also highly disruptive. While the questioning of any one individual may take a few minutes, the agents are present and the exits sealed for several hours. *See* discussion *supra* at 4-5. During this time, work comes to a virtual standstill — understandably, since the workers are being watched by law enforcement agents the whole time — and the workers are upset and nervous for days thereafter. The foreboding possibility of a surprise raid creates tension and apprehension much of the time. The factory raid procedures thus intrude not only on the workers' privacy but on their right to earn a living and be a productive member of American society as well. The raid is thus strikingly different from the brief, regularized, unsurprising encounter approved in *Martinez-Fuerte*.

This is especially so because, unlike *Martinez-Fuerte*, the INS agents appear to have total discretion as to whom they question. As the questioning continues, it will become clear to the workers that the agents are only questioning some portion of those who look "Mexican". In effect, the raids make second-class citizens out of those who, because they look Hispanic, are subjected to unwarranted challenges to their citizenship and who must — unlike other citizens — be ready to produce proof of their citizenship when asked.[10]

[10] This country has never required its citizens to carry identification which must be produced at any time at the arbitrary behest of

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Against the highly intrusive, threatening, and insulting character of the factory raids we must balance the government interests they supposedly advance. The government claims that factory raids are an extremely effective procedure for locating and apprehending illegal aliens. Petitioners Brief at 15. Ordinarily, a court would leave these determinations to Congress. But because factory raids threaten Fourth Amendment rights (as well as Fifth Amendment rights) this Court may appropriately examine with a critical eye both the relative importance of the goal of apprehending illegal aliens and the effectiveness of factory raids in implementing it.

To begin with, it is hardly clear that the government's interest in excluding aliens is strong enough to justify the intrusions on Fourth Amendment rights caused by factory raids. As this Court noted in *Almeida-Sanchez v. U.S.*, *supra*, 413 U.S. at 273:

> "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."

At the same time, Congress has done little to deal effectively with the issue. Justice White has observed:

> "The entire system . . . has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country."

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a government official, and it is not clear that such a requirement would be constitutional. *See Brown v. Texas, supra,* 443 U.S. at 47 & 52 n.3.

U.S. v. Brignoni-Ponce, supra, 422 U.S. at 915 (White, J., concurring).

Congress has so far taken no such steps. Nor is it clear that illegal aliens are in fact harmful to the economy or the documented workforce.[11]

Whatever the interest in and importance of the general goals of the immigration laws, factory raids are hardly the irreplaceable tool the INS claims, even under the current statutory scheme.[12]

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[11] Much of the recent Congressional testimony indicates they are a benefit to the economy, filling jobs which documented workers will not perform and paying more taxes into the system than they take out in benefits. *U.S. Immigration Policy and the National Interest: Committees on the Judiciary, House of Representatives and the United States Senate*, 97th Cong., 1st Sess. 8, 36, 99 (1981).

[12] In its final report, a recent commission emphasized that "it is both more humane and cost effective to deter people from entering the United States than it is to locate and remove them from the interior." *U.S. Immigration Policy and the National Interest: Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy to the Congress and the President of the United States* 47 (1981). One study done for this commission estimated that Border Patrol Operations cost $43.38 per illegal alien apprehended as opposed to a cost of $73.55 per alien expelled as a result of INS operations in the interior. North, *Enforcing the Immigration Law: A Review of the Options* 16-17 (1980); and the same study notes that "INS has traditionally allocated a relatively slight portion of its resources to interior enforcement," *id.* at 53. Reports of the recent, highly publicized "Operation Jobs" raids in April 1982 suggest that those raids opened up few jobs for documented workers while imposing significant costs on taxpayers, workers, and employees. The INS arrested 5,440 employed aliens in nine metropolitan areas, and claimed that the project was a great success, since "the jobs referred represent $50.6 million in annual wages." INS, *Preliminary Report on Project Jobs* 1 (1983). But the raids cost not only more than $1 million in direct INS expenditures but also unestimated losses caused by interrupted production, workplace disruptions, and the need to hire and train new workers. And it appears that within a few days or weeks a high percentage of the apprehended aliens were back at work in the United States, many

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The INS should therefore be required to practice the same kinds of individualized investigating techniques used successfully by other law enforcement agencies. Requiring reasonable individualized suspicion would not, as the government claims, make the immigration laws unenforceable. It will merely force the INS to engage in the careful, individualized enforcement of laws it performed in *Cortez*.

This analysis is not offered to urge this Court to declare the immigration laws, or their enforcement in the interior, unconstitutional. To the contrary, the point is that the immigration laws *can* be enforced in ways far more compatible with the reasonable expectations of privacy held by documented workers. Given the low effectiveness of factory raids and the somewhat questionable priority of those raids in the scheme of government enforcement of the immigration laws, it can hardly be said that the government interests in practicing factory raids overcome the raids' highly intrusive, threatening and insulting nature. They are simply not important enough to justify stigmatizing and treading on the privacy rights of millions of citizens of Hispanic ancestry, not to mention the millions of legal aliens who are productive members of American society. A requirement of individualized suspicion is essential.

D. The INS Had Inadequate Individualized Suspicion Of Alienage Or Illegal Alienage To Justify The Factory Raids.

The government cites the following factors which, it contends, justified the factory raids: the garment industry is known to employ illegal aliens; several illegal alien employees had been arrested outside the Davis plant and told the INS others were employed there; when the INS entered, the plant's employees shouted "La Migra" and some hid; and, for the second Davis raid, that the first Davis raid had produced 78 formal arrests.

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of the American citizens who took "referred" jobs quit them, and these jobs were taken by other illegal aliens.

Of these proffered justifications, none pointed to *any* particular person, except the fact that certain people ran or attempted to hide. A person's effort to avoid contact with law enforcement authorities is insufficient, in and of itself, to justify those authorities in detaining that person. "[r]efusal to listen or answer does not, without more, furnish . . . grounds [for detention]." *Florida v. Royer, supra*, 103 S.Ct. at 1324 (Opinion of White, J.). But even if it does, such conduct certainly does not raise a suspicion about those — such as respondents — who *do not* attempt to hide.

It is apparent, as the court of appeals held, that the INS did not have adequate grounds to suspect everyone in the factory, and thus had no grounds for detaining the entire workforce. Nor did the INS have grounds to suspect those it chose to question. Assuming the INS did have adequate grounds, based on its tips and expertise, to suspect that illegal aliens were working at Davis and Mr. Pleat, the INS could still not claim to have anything close to a reasonable suspicion that any given individual was an illegal alien. The mere presence of a person in a high-crime area "is not a basis for concluding that [that person is] engaged in criminal conduct," *Brown v. Texas, supra*, 443 U.S. at 52.

As the statement of facts demonstrates, the *only* evidence the INS gathered about any individual prior to selection for interrogation was ethnic appearance: did the person look, dress, and perhaps talk like the stereotype of the Mexican alien? As shown earlier, ethnic appearance is empirically a poor indicator. Of those who appear to be of Mexican descent, only some are aliens; and of those aliens only some are illegal. A suspicion of alienage, especially illegal alienage, based on ethnic appearance is so tenuous it cannot be considered reasonable.

This Court and lower courts have in nearly all cases rejected the use of ethnic characteristics alone to generate suspicion adequate to justify detention. In *Brignoni-Ponce*, this Court rejected the Border Patrol's claim that

the "apparent Mexican ancestry" of three occupants of a car "furnished reasonable grounds to believe that the three occupants were aliens." 422 U.S. at 886. In *U.S. v. Mallides*, 473 F.2d 859 (9th Cir. 1973), the court rejected a stop based on the observation that "Six Mexican-American appearing males were riding in a Chrysler Imperial at dusk, sitting erectly, and none turned to look at the passing patrol car." *Id.* at 861. The court stated, "Tested by any objective standard, there is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious simply because the skins of the occupants are nonwhite or because they sit up straight or because they do not look at at passing police car." *Id.*

The only case in which this Court has intimated that racial appearance might be enough of a criterion for police action is *Martinez-Fuerte*, where the Court stated that "it is constitutional to refer motorists selectively to the secondary inspection area . . . on the basis of criteria that would not sustain a roving patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation." 428 U.S. at 563. This language, however, hardly supports any effort to use ethnic appearance as a basis for a seizure outside the limited context of permanent checkpoints. The basis for this holding was that individualized suspicion was not required at checkpoints; the clear implication is that ethnic appearance does ***not*** create ***individualized*** suspicion, and is thus an impermissible basis for detention when individualized suspicion is required. The Court was also careful to note that the record supported the government's assertion that the Border Patrol was ***not*** relying only on ethnic appearance. 428 U.S. at 563 n.16. Finally, it stated that its holding was "confined to permanent checkpoints" and that "upon a proper showing, courts would not be powerless to prevent the misuse of checkpoints to harass those of Mexican ancestry." *Id.* at 566 n.19.

Outside the context of the permanent checkpoint, therefore, ethnic appearance is not enough to raise a suspicion that will justify detention. Factory raids thus fail to meet the Fourth Amendment's requirement of individualized suspicion.

III.

THE INS' FACTORY RAIDS VIOLATE THE EQUAL PROTECTION GUARANTEES OF THE FIFTH AMENDMENT

The Fifth Amendment principles of equal protection of the law are clearly applicable to the procedures employed by the INS. On the basis of the record below it is evident that the racial discrimination involved in the INS factory raids is much more the heart of the constitutional matter than the unreasonable nature of the intrusions on the every day life of American citizens and legal aliens of Hispanic ancestry. The record is replete with admissions showing that absolutely no standard exists for the mass detention of an entire work force at a factory other than unsubstantial complaints based on speculation and rumor and the fact that Hispanic-looking persons are employed there, and no guidelines whatsoever are referred to in determining the particular members of that work force who are to be interrogated other than, once again, the fact that said individuals look, talk or dress consistent with the INS agent's perception of how Mexicans look, talk and dress.

A. A Decision Based On The Equal Protection Guarantees Of The Fifth Amendment Is Necessary In Order To Protect Respondents As Well As Other Persons Similarly Situated.

Whatever the application to a strictly Fourth Amendment question of the balancing or weighing of interests test enunciated by the United States Supreme Court, *see, e.g., Camara v. Municipal Court, supra,* 387 U.S. at 535-538, the

presence of a government practice based on the use of invidious racial or ethnic classifications requires that any analysis of constitutionality be made under the due process clause of the Fifth Amendment as well as the search and seizure protections of the Fourth Amendment. To do otherwise, would be to undermine the requirement that a compelling state interest be shown before an invidious racial classification can be permitted.

The foregoing discussion may be academic because, tested against the traditional Fourth Amendment balance standard, the INS procedures, to the extent based solely on the Latin ancestry of persons stopped and detained at their place of employment by roving INS patrols, *are*, per se, unreasonable. This would appear to be the purport of the Fourth Amendment cases discussed above. Were it to be held, however, that the public interest in uncovering illegal aliens outweighed the intrusion on innocent, law-abiding employees which is the clear result of the factory raid procedure, it is the position of *amici* that the factory raids, because based on invidious racial classifications, would still need to pass muster under the compelling state interest test of the Fifth and Fourteenth Amendments.

B. The Constitutional Guarantee Of Equal Protection Of The Law.

It is settled that the equal protection guarantees of the Fourteenth Amendment apply through the due process clause of the Fifth Amendment to actions by the federal government, whether legislative, executive or administrative. *See, e.g., Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975); *Bolling v. Sharpe,* 347 U.S. 497, 498-499 (1954). The centerpiece of the doctrine of equal protection of the law is the rule that classifications based on suspect criteria, such as racial or ethnic factors, violate equal protection unless justified by a compelling governmental interest. The suspect criteria doctrine was first enunciated by this Court in the case of *Korematsu v. United States,* 323 U.S. 214 (1944),

where the Court mandated that courts strictly scrutinize any classification based on racial characteristics, stating:

> "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are *immediately suspect*. This is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most *rigid scrutiny*. *Pressing public necessity* may sometimes justify the existence of such restrictions; racial antagonism never can." 323 U.S. at 216 (emphasis added).

Since *Korematsu*, the strict scrutiny requirement has proved fatal to every suspect classification: this Court has never again upheld an enactment which discriminated, whether on its face or as applied, on the basis of race. See L. Tribe, *A Structure For Liberty* 1000 (1978). Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Devolving Doctrine on a Changing Course: A Model For a Newer Equal Protection*, 86 Harv.L.Rev. 1, 8 (1972). As the Supreme Court noted in *Korematsu*:

> "Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either." 323 U.S. at 218.

Even prior to the enunciation of the suspect criteria and strict scrutiny doctrine, the United States Supreme Court had acted to strike down laws which singled out minority groups for treatment different than that accorded their fellow citizens. In so doing, the Court made it clear that equal protection guarantees against invidious discrimination also extend to the administration and application of facially-neutral statutes or regulations. The landmark case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), for example, is in many ways strikingly similar to the case at bar in that it involved an enactment arguably neutral on its face but which was applied on a discriminatory basis, treating one

group of individuals different from the general population on the sole basis of race. The Court held:

> ". . . Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution . . ." 118 U.S. at 373-374.

While the teaching of *Yick Wo* that neutral laws may run afoul of the Constitution by virtue of the manner in which they are applied is directly applicable to the facts at bar, the decision of the Court has an additional significance which should not be overlooked. Like the factory raids at issue herein, the enactment in *Yick Wo* lent itself to abuse by permitting such unbridled discretion on the part of the individuals charged with enforcing its terms that the application of the enactment was virtually preordained to result in discrimination. In language which is highly pertinent to the situation at bar, where INS agents are left with uncontrolled discretion to base stops and interrogations on perceptions of racial characteristics, the Court held in *Yick Wo:*

> ". . . [The ordinances] seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons . . . The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." 118 U.S. at 366-367.

While *Yick Wo* involved an abuse of discretion in the administration of a public ordinance by a city licensing

board, the underlying principle has been properly held to apply to the actions of the law enforcement officials, in positions similar to the INS agents in the case at bench, in carrying out state or federal laws. *See, e.g., Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 588; *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972); *United States v. Robinson*, 311 F.Supp. 1063 (W.D. Missouri 1969).

Under the standard articulated in *Yick Wo*, the primary use of racial characteristics by INS agents in deciding whom to detain and question during factory raids is clearly sufficient to trigger strict scrutiny by this Court. Under such an analysis, it is respectfully submitted that this Court cannot but conclude that the unbridled discretion given INS agents in conducting factory raids and the consequent reliance by said agents on impermissible racial and ethnic characteristics renders the factory raid, like the INS area search and the roving patrol when similarly unfettered, "fundamentally offensive to this nation's historical concepts of proper law enforcement techniques." *Marquez v. Kiley, supra*, 436 F.Supp. at 114.

CONCLUSION

For all the foregoing reasons, *amici* respectfully request that the judgment of the court of appeals be upheld.

Respectfully submitted,

MICHAEL KANTOR
Amicus Curiae Counsel of Record,
ALAN DIAMOND
JOHN W. COCHRANE
CARY H. THOMPSON
MANATT, PHELPS, ROTHENBERG & TUNNEY
1888 Century Park East, 21st Floor
Los Angeles, California 90067
Attorneys for Amicus Curiae, Mexican American Legal Defense and Educational Fund, Inc. and American Jewish Committee

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